

# **TOWN OF DAVIE TOWN COUNCIL AGENDA REPORT**

**TO:** Mayor and Councilmembers

**FROM/PHONE:** Ken Cohen, Assistant Town Administrator (954) 797 1030

**SUBJECT:** Resolution  
Agreement for Mitigation

**AFFECTED DISTRICT:** Located in District 4, however has Townwide impact.

**TITLE OF AGENDA ITEM:**

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO ENTER INTO AN AGREEMENT BETWEEN HOME DYNAMICS, INC. AND THE TOWN OF DAVIE FOR HOME DYNAMICS, INC. TO UTILIZE UP TO EIGHTY-TWO (82) ACRES OF TOWN OWNED LAND TO CREATE A NATURAL WETLAND MITIGATION AREA.

**REPORT IN BRIEF:**

For a number of years Councilmembers have discussed purchasing a large track of land to develop a natural wetland/educational facility/passive park. A plan has been taking shape over the last two years and the first step has been completed with the purchase of the Van Kirk parcel (approximately 115 acres).

In continuing the natural progression of the plan, our next step is to contract for the building of the wetland area. The attached agreement provides for Home Dynamics, Inc. to receive the right to utilize the property for the purposes of off-site water detention, water retention, drainage and mitigation of approximately eighty-two (82) acres of wetlands to the Van Kirk Site. For this right, Home Dynamics, Inc. agrees to build an equal amount of wetland acres at the site. It also requires they contribute to the Town of Davie the sum of \$943,000.00 to establish a funding mechanism for the maintenance of the property. The Town's maintenance responsibilities would start five (5) years after completion of the project.

**PREVIOUS ACTIONS:** Purchase of Van Kirk Property

**CONCURRENCES:** N/A

**FISCAL IMPACT:** N/A

**RECOMMENDATION(S):** Motion to approve resolution

**Attachment(s):** Resolution  
Agreement for Mitigation

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA AUTHORIZING THE MAYOR TO ENTER INTO AN AGREEMENT BETWEEN HOME DYNAMICS, INC. AND THE TOWN OF DAVIE FOR HOME DYNAMICS, INC. TO UTILIZE UP TO EIGHTY-TWO (82) ACRES OF TOWN OWNED LAND TO CREATE A NATURAL WETLAND MITIGATION AREA.

WHEREAS, It is the Town councils' desire to create a natural wetland/educational center/passive park site and;

WHEREAS, The Town owns certain land known as the Van Kirk property consisting of approximately one hundred fifteen (115) acres; and

WHEREAS, Home Dynamics, Inc. wishes to utilize eighty-two (82) acres of land from the Town to create a mitigation area;

NOW, THEREFORE, BE IT RESOLVED, THAT THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA:

SECTION 1. The Town Council of the Town of Davie hereby authorizes the Mayor to execute the "Agreement for Mitigation" attached as Exhibit "A" upon receipt of written notification of approval of this agreement by Florida Communities Trust and Broward County.

SECTION 2. This resolution shall take effect immediately upon passage and adoption.

PASSED AND ADOPTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2004

\_\_\_\_\_  
Mayor/Councilmember

ATTEST:

\_\_\_\_\_  
Town Clerk

APPROVED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2004

**AGREEMENT FOR MITIGATION**

**between**

**TOWN OF DAVIE**

**and**

**HOME DYNAMICS, INC.**

## AGREEMENT FOR MITIGATION

between

TOWN OF DAVIE

and

HOME DYNAMICS, INC.

This is an Agreement, made and entered into by and between the TOWN OF DAVIE, a political subdivision of the State of Florida, hereinafter referred to as ("TOWN") and HOME DYNAMICS, INC., a Florida corporation, authorized to do business in the State of Florida, hereinafter referred to as ("HOME DYNAMICS").

**WHEREAS**, HOME DYNAMICS is planning on building sixty-two (62) single-family homes at 1900 Hiatus Road, which is generally located on the east side of Hiatus Road, immediately south of the Village of Harmony Lakes Development in the Town. The project, known as Sierra Ranches, consists of approximately eighty-nine (89) acres, with approximately seventeen (17) acres to be mitigated on site; and

**WHEREAS**, TOWN owns certain land known as the Van Kirk Property consisting of approximately one hundred fifteen (115) acres; hereinafter referred to as ("TOWN'S PROPERTY"); and

**WHEREAS**, HOME DYNAMICS will utilize eighty-two (82) acres of land from the Town located on the TOWN'S PROPERTY to create a mitigation area, hereinafter referred to as (the "PROPERTY"); and

**WHEREAS**, HOME DYNAMICS must comply with Environmental Resource Permit Number \_\_\_\_\_, hereinafter referred to as the ("PERMIT"), issued by the South Florida Water Management District, hereinafter referred to as ("SFWMD"), as well as with Wetland License Number \_\_\_\_\_, hereinafter referred to as the ("LICENSE"), issued by the Department of Planning and Environmental Protection, hereinafter referred to as the ("DPEP"); said PERMIT and LICENSE are incorporated herein by reference; and

**WHEREAS**, in accordance with the PERMIT and the LICENSE, HOME DYNAMICS must undertake certain mitigation work for the construction work referenced herein and is proposing to perform such mitigation on TOWN'S PROPERTY; hereinafter referred to as the ("PROJECT"); and

**WHEREAS**, approximately eighty-two (82) acres of total mitigation work required of HOME DYNAMICS pursuant to the PERMIT and the LICENSE will be done on TOWN'S

PROPERTY; and

**WHEREAS**, TOWN shall approve the overall site design for the mitigation work; and

**WHEREAS**, HOME DYNAMICS must have written approval to enter upon TOWN'S PROPERTY to perform the mitigation work required by the PERMIT and the LICENSE; and

**WHEREAS**, HOME DYNAMICS shall submit to TOWN all transmittal documentation required by other governmental agencies regarding the mitigation work including, but not limited to, environmental studies, audits, surveys, correspondence to other governmental agencies and reports; and

**WHEREAS**, TOWN agrees that the mitigation work required of HOME DYNAMICS on TOWN'S PROPERTY will significantly benefit the public, and as such, is in TOWN'S best interest.

NOW, THEREFORE, in consideration of the mutual terms, conditions, promises, and covenants as herein set forth, HOME DYNAMICS and TOWN agree as follows:

1. That the above recitals are true and correct and made a part hereof as if set forth in full hereunder.
2. TOWN agrees to issue any necessary permits and licenses required to allow HOME DYNAMICS to access TOWN'S PROPERTY in order to undertake the required mitigation work for the PROJECT described in this Agreement.
3. TOWN hereby authorizes and approves the mitigation work for the PROJECT to be undertaken by HOME DYNAMICS on TOWN'S PROPERTY as set forth above and in SFWMD Permit Number \_\_\_\_\_, as well as in DPEP License Number DF-\_\_\_\_\_. HOME DYNAMICS shall complete the mitigation work for the PROJECT, as described in the Agreement and the LICENSE referenced herein, within two (2) years from the date the last permit for the mitigation work is issued by DPEP and/or the SFWMD and/or the Army Corp. of Engineers, if applicable. Upon HOME DYNAMICS demonstrating good cause and under reasonable circumstances, the TOWN may extend the above-noted completion date.

In the event any regulatory agencies with jurisdiction over the PROJECT determine that HOME DYNAMICS is not complying with the terms and conditions for the mitigation work set forth in the applicable LICENSE and this Agreement for completion of the PROJECT, TOWN may require that HOME DYNAMICS undertake a corrective action plan established by the TOWN. Failure of HOME DYNAMICS to satisfactorily comply with the corrective plan, as determined by the TOWN, will be deemed an event of default enabling the TOWN to seek recovery under the

Performance Bond for this PROJECT, in addition to other remedies available to TOWN by law.

4. TOWN shall approve the overall site design for the mitigation work prior to issuing any necessary permits or licenses to HOME DYNAMICS.
5. HOME DYNAMICS shall obtain and pay for all necessary permits and licenses from TOWN and any other regulatory agencies, if any, for the mitigation work, and TOWN agrees to cooperate concerning the same.
6. It is expressly understood and agreed to by the parties that the rights herein conveyed by this Agreement are permissive rights only and shall not operate to create or vest any property rights in HOME DYNAMICS.
7. TOWN and HOME DYNAMICS understand and agree that HOME DYNAMICS may utilize the Property for purposes of off-site water detention, water retention, drainage and mitigation for HOME DYNAMICS and other properties located within the TOWN.
8. HOME DYNAMICS covenants and agrees to do all things necessary and required by this Agreement and the mitigation work contemplated in the PERMIT and in the LICENSE.
9. HOME DYNAMICS shall be responsible for ensuring that all work performed on TOWN'S PROPERTY shall substantially conform to the requirements of the PERMIT and the LICENSE and the mitigation plan submitted by HOME DYNAMICS and approved by TOWN; upon approval by TOWN, said mitigation plan shall be incorporated herein. HOME DYNAMICS, through its consultant(s) and/or contractor(s), shall assign a Project Manager to oversee the mitigation project and to be available on site during all regular working hours. HOME DYNAMICS agrees to perform the services within the time frames established in the Project Schedule to be approved by TOWN with the mitigation plan. Upon approval by TOWN, the parties shall have the right to mutually agree to changes to the Project Schedule.
10. HOME DYNAMICS, through its consultant(s) or contractor(s), shall cause the mitigation work described in the PERMIT and the LICENSE to have the least impact on the functions of TOWN'S PROPERTY, and shall schedule the mitigation activities in a manner so as not to unreasonably interfere with the use of TOWN'S PROPERTY. All equipment staging areas, stockpile areas, and haul routes are to be determined and approved by TOWN prior to the commencement of any site work.
11. HOME DYNAMICS shall, at its expense, provide to TOWN'S individual designated

in Section 15 of this Agreement, before and after color aerial photographs of those portions of TOWN'S PROPERTY to be mitigated. The before photograph must be submitted prior to the initiation of the permitted work and the after photograph must be submitted within thirty (30) calendar days after the completion of the PROJECT. The photographs must be 8" x 10," taken at an altitude of not more than 500', and must encompass the entire PROJECT area. Photo's must be printed, labeled and dated by the flying company on glossy photo paper.

- 10A. HOME DYNAMICS shall hire a firm, approved by TOWN, to complete a non-nuisance and native vegetation inventory on the mitigation site prior to starting the PROJECT.
- 10B. HOME DYNAMICS, by and through its Contractor(s) hired to perform the mitigation for the PROJECT, agrees not to injure or kill non-nuisance or native vegetation on TOWN's PROPERTY. HOME DYNAMICS will assure replacement of non-target trees and other plants that are injured or lost due to its Contractor's negligence or carelessness. Replacement vegetation shall be based on the most current and accepted industry standards available with regard to plants injured or killed and consistent with TOWN's environmental policies.
- 11. HOME DYNAMICS shall have the right to enter into and upon TOWN PROPERTY to the extent necessary to fulfill its functions and obligations under this Agreement, the PERMIT, and the LICENSE. However, prior to commencing the mitigation work, HOME DYNAMICS shall consult with TOWN regarding proper ingress and egress routes through TOWN'S PROPERTY. HOME DYNAMICS will be fined each time a vehicle fails to enter or leave the site via the agreed upon ingress and egress routes at \$500 per vehicle per occurrence. Any fill material excavated in conjunction with the described mitigation work is the exclusive property of TOWN (disposition of fill material including any stockpiling area to be determined prior to beginning excavation.) The SFWMD staff and DPEP shall also have the right to enter onto TOWN'S PROPERTY to inspect for compliance with the PERMIT. HOME DYNAMICS will coordinate with the parties to ensure that the materials are disposed of in compliance with the guidelines of all relevant regulatory agencies, and will communicate to TOWN in writing any problem/situation that may or has arisen with other governmental agencies and all remedies taken or that may need to be taken necessary to meet all compliance.
- 12. Any notice or other communication required or permitted to be given hereunder shall be in writing and sent certified mail and shall be deemed to have been duly given if deposited in the United States mail. Notice shall be given to all the individuals listed below at the address indicated:

FOR TOWN:

Chris Kovanes  
Acting Town Administrator  
Town of Davie  
6591 Orange Drive  
Davie, FL 33314

Dennis Andresky  
Parks & Recreation Director  
Town of Davie  
6591 Orange Drive  
Davie, FL 33314

Bruce Bernard  
Public Works Director  
Town of Davie  
6591 Orange Drive  
Davie, FL 33314

With a copy to:

Monroe Kiar,  
Town Attorney  
6191 S.W. 45th Street  
Suite 6151A  
Davie, FL 33314

FOR HOME DYNAMICS:

Alejandro Delfino  
Land Development Director  
Home Dynamics, Inc.  
4788 West Commercial Boulevard  
Tamarac, FL 33319

Dennis Mele, Esq.  
Ruden, McClosky, Smith,  
Schuster, & Russell, P.A  
200 East Broward Boulevard  
Suite 1500  
Fort Lauderdale, FL 33301

13. HOME DYNAMICS and TOWN are hereby required to each designate an individual



with whom HOME DYNAMICS and its consultant(s)/contractor(s) can coordinate all activities and approvals required by this Agreement. Unless otherwise notified in writing, the individuals shall be as follows: For HOME DYNAMICS, the designated individual is Alejandro Delfino and for TOWN, the designated individual is Chris Kovanes, Acting Town Administrator.

14. HOME DYNAMICS shall at all times hereafter indemnify, hold harmless and, at the option of the Town Attorney, defend or pay for an attorney selected by the Town Attorney to defend TOWN, its officers, agents, servants, and employees against any and all claims, losses, liabilities, and expenditures of any kind, including attorney fees, court costs, and expenses, caused by negligent act or omission of HOME DYNAMICS, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, demands, or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property. The provisions of this section shall survive the expiration or earlier termination of this Agreement.
15. TOWN shall have the right at any time to inspect the lands and the eradication of exotic plant species referenced in the PERMIT and in the LICENSE, to examine work records and to test chemicals being used. In the event that HOME DYNAMICS fails to perform the work under this Agreement within the time frames established in the Project Schedule set forth in Exhibit "B" herein, Town shall provide written notice requiring the satisfactory correction of that failure, as determined by TOWN may, at its discretion, grant one (1) extension to the initial time frame established for corrective action. Thereafter, any additional extensions may only be granted by TOWN in its discretion, upon a showing by HOME DYNAMICS of a substantial hardship in not being able to complete the particular task within the established time frame. Notwithstanding the above TOWN and HOME DYNAMICS agree that any failure by HOME DYNAMICS to adhere to the Project Schedule due to delays in governmental permitting which are not the fault of HOME DYNAMICS and force majeure matters, including inclement weather, will be resolved by the Contract Administrators by amending the Project Schedule to grant HOME DYNAMICS a reasonable additional amount of time to perform the work. In the event a failure occurs, as identified in the previous sentence, HOME DYNAMICS will not be subject to the payment of liquidated damages. If the Contract Administrators cannot agree on a reasonable amount of time under the circumstances presented, TOWN's decision will be final. HOME DYNAMICS acknowledges and agrees to pay TOWN the sum of dollars identified below for each calendar day after the applicable time for performance established in the Project Schedule, plus any time extensions granted by TOWN, until completion of the work at Five Hundred Dollars (\$500) per day.

These amounts are not penalties but are liquidated damages to TOWN for its

inability to proceed with, and have the Project completed in a timely manner pursuant to the agreed upon Project Schedule. Liquidated damages are hereby fixed and agreed upon by the parties, recognizing the impossibility of precisely ascertaining the amount of damages that will be sustained by TOWN as a consequence of such delay, and both parties desiring to obviate any question or dispute concerning the amount of said damages and the cost and effect of the failure of HOME DYNAMICS to complete the work within the applicable time for performance set forth in the Project Schedule. This provision shall not affect the rights and obligations of either party as set forth in Section 15, Indemnification of TOWN.

Notwithstanding TOWN's right to liquidated damages, if HOME DYNAMICS fails to remedy the failure, to the satisfaction of TOWN, within the time frame established by TOWN for said failure, and any extensions granted at TOWN'S sole option, this will be deemed an event of default enabling TOWN to (i) seek recovery under the Performance Bond for this PROJECT, in addition to other remedies available to TOWN by law or (ii) elect, in its discretion, to have such failure remedied by TOWN and any monies expended by TOWN shall be the sole obligation of HOME DYNAMICS who shall promptly reimburse TOWN for all costs and expenses incurred to remedy the failure of HOME DYNAMICS.

16. HOME DYNAMICS agrees that, upon completion of the work under this Agreement, HOME DYNAMICS shall cause all equipment, chemical containers and appurtenances associated with the mitigation work for the PROJECT to be removed from TOWN'S PROPERTY within two weeks.
17. HOME DYNAMICS agrees to monitor and maintain the mitigation work for the PROJECT according to the PERMIT and the LICENSE and assign personnel to supervise the application of herbicide, if necessary, for a period of five (5) years from completion of PROJECT. Copies of all correspondence and monitoring reports, as well as all transmittal documentation required by other governmental agencies regarding the mitigation work including, but not limited to, environmental studies, audits, surveys, correspondence to other governmental agencies and reports, must be submitted to TOWN, the South Florida Water Management District and the Department of Planning and Environmental Protection. HOME DYNAMICS or its contractor's supervisory personnel and applicators must possess a current Commercial Restricted Use Pesticide Applicator License ("Applicator License") with proof of aquatic herbicide application training and be in good standing with the Florida Department of Agriculture and Consumer Services (FDACS) and all other regulatory agencies having jurisdiction over such entity holding the Applicator License. No herbicide shall be applied by unlicensed personnel. A copy of this Application License must be provided to TOWN prior to commencement of the mitigation work for the PROJECT.

18. HOME DYNAMICS agrees to use reasonable care and due diligence in assisting TOWN in maintaining the area(s) affected by the required mitigation work for the PROJECT, and in protecting the public and natural resources in the area(s) affected by the performance of the PROJECT on TOWN'S PROPERTY during the course of the mitigation work performed by HOME DYNAMICS.
19. This Agreement shall remain in effect until such time as necessary to satisfy the requirements of this Agreement, the PERMIT and the LICENSE, but in no event shall it extend beyond completion of the construction phase, which includes passing regulatory final inspection plus five (5) years monitoring and maintaining mitigation site plus any error time, unless otherwise agreed upon by the Parties.
20. HOME DYNAMICS agrees to include the following indemnification provisions in its contract with the successful contractor(s) engaged to complete the mitigation work for the PROJECT:
  - a. In consideration of Twenty-five Dollars (\$25.00) and other valuable consideration, the Contractor shall indemnify and save harmless Town of Davie, its officers, agents and employees, from or on account of any injuries or damages, received or sustained by any person or persons during or on account of any operations connected with the work to be performed on the PROJECT including a warranty period; or as a consequence of any negligence (excluding sole negligence of TOWN in connection with the same); or by use of any improper material or on account of any act or omission of the Contractor or his or her subcontractors, agents, servants or employees. Contractor agrees to indemnify and save harmless TOWN, including the warranty period, against any claims or liability arising from or based upon the violation of any federal, state, Town or city laws, by-laws, ordinances or regulations by the Contractor, his or her subcontractors, agents, servants or employees. Contractor agrees to indemnify and save harmless TOWN from all such claims and fees and from any and all suits and actions of every name and description that may be brought against TOWN. These indemnification provisions survive the term of the Contract. In the event that any action or proceedings is brought against TOWN, by reason of any such claim or demand, the Contractor, upon written notice from TOWN shall defend such action or proceeding by counsel satisfactory to TOWN.
  - b. The indemnification provided above shall obligate the Contractor to defend at its own expense or to provide for such defense, at TOWN'S option, any and all claims of liability and all suits and actions of every name and description that may be brought against TOWN, excluding only those which allege that

the injuries arose out of the sole negligence of TOWN which may result from the operations and activities under this Contract whether the application of herbicide be performed by the Contractor, its subcontractor, or by anyone directly or indirectly employed by either.

21. HOME DYNAMICS agrees to include in its contract with the successful Contractor(s) the requirements contained in this Agreement and further agrees to provide TOWN, prior to application of herbicide, Certificates of Insurance evidencing HOME DYNAMICS' compliance with the requirements of this section.

INSURANCE REQUIREMENTS:

- a. Without limiting any of the other obligations or liabilities of the Contractor, Contractor shall provide, pay for and maintain in force until all of its work to be performed under this Agreement has been completed and accepted by TOWN five (5) years from completion and acceptance of construction date (or for such duration as is otherwise specified hereinafter), the insurance coverages set forth herein:
  1. Worker's Compensation insurance to apply for all employees in compliance with the "Worker's Compensation Law" of the State of Florida and all applicable federal laws. In addition, the policy(ies) must include Employers' Liability with a limit of One Hundred Thousand Dollars (\$100,000.00) for each accident.
  2. Comprehensive General Liability insurance with minimum limits of One Million Dollars (\$1,000,000.00) per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form not more restrictive than the latest edition of the Comprehensive General Liability policy, without restrictive endorsements, as filed by the Insurance Services Office and must include:
    - (a) Premises and/or Operations; and
    - (b) Independent Contractors; and
    - (c) Products and/or Completed Operations.
- b. If the initial insurance expires prior to the completion of the mitigation work, renewal copies of policies shall be furnished to TOWN thirty (30) days prior to the date of their expiration.
- c. Notice of Cancellation and/or Restriction - The policy(ies) must be endorsed to provide TOWN with thirty (30) days notice of cancellation and/or restriction.

- d. Prior to Town's approval, the Contractor shall furnish to Town's Contract Administrator Certificates of Insurance or endorsements evidencing the insurance coverage specified above. The required Certificates of Insurance shall name the types of policies provided, the insured and additional insured, as well as inception and expiration dates.
- 23. HOME DYNAMICS shall be required to post security in the form of a Letter of Credit to the Broward County Department of Planning and Environmental Protection and the South Florida Water Management District for the cost of the mitigation work for the PROJECT prior to the issuance of any permits or licenses for the PROJECT. In addition, HOME DYNAMICS agrees that, prior to commencement of any eradication of exotic species through its Contractor(s), it will deliver, or cause to be delivered to TOWN one (1) or more Payment and Performance Bonds ("Bond") for the PROJECT in a form acceptable to Town's Risk Manager or shall prepay in full to the Contractor(s) the completion of its work by placing said funds in escrow for the benefit of the Contractor(s) upon completion of said work.
- 24. Upon successful completion of the monitoring plan as described in Exhibit "A" and final inspection and acceptance by TOWN, TOWN shall be responsible for the PROJECT maintenance in perpetuity. Exotics and nuisance species shall be maintained by TOWN at less than Five Percent (5%) of the total species within the mitigation site.
- 25. Ownership of Documents. Any and all reports, photographs, surveys, and other data and documents provided or created in connection with this Agreement are and shall remain the property of the respective party providing or creating same. All documents requested and delivered to TOWN become property of TOWN.
- 26. Audit Right and Retention of Records. Each party shall have the right to audit the books, records, and accounts of the other parties with respect to this Agreement. The parties shall keep such books, records, and accounts as may be necessary in order to record complete and correct entries related to this Agreement.

The parties shall preserve and make available, at reasonable times for examination and audit by the other parties, all financial records, supporting documents, statistical records, and any other documents pertinent to this Agreement for the required retention period of the Florida Public Records Act (Chapter 119, Fla. Stat.), if applicable, or, if the Florida Public Records Act is not applicable, for a minimum period of three (3) years after termination of this Agreement. If any audit has been initiated and audit findings have not been resolved at the end of the retention period or three (3) years, whichever is longer, the books, records, and accounts shall be retained until resolution of the audit findings. If the Florida Public Records Act is

determined by a party to be applicable to a party's records, that party shall comply with all requirements thereof; however, no confidentiality or non-disclosure requirement of either federal or state law shall be violated by that party.

27. Nondiscrimination, Equal Employment Opportunity, and Americans with Disabilities Act. HOME DYNAMICS shall not unlawfully discriminate against any person in its operations and activities or in its use or expenditure of funds in fulfilling its obligations under this Agreement. In addition, each party shall take affirmative steps to ensure nondiscrimination in employment against disabled persons. Such actions shall include, but not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff, termination, rates of pay, other forms of compensation, terms and conditions of employment, training (including apprenticeship), and accessibility.
28. Merger. This Agreement incorporates and includes all prior negotiations, correspondence, conversions, agreements or understandings applicable to the matter contained herein. It is further agreed that no change, alteration or modification in the terms and conditions contained herein shall be effective unless contained in written document executed with the same formality and of equal dignity herewith in accordance with Section 41 below and with SFWMD's prior notification and written consent.
29. TOWN and HOME DYNAMICS agree that time is of the essence with respect to the terms and conditions of this Agreement.
30. HOME DYNAMICS, by and through its Contractor(s) hired to perform the mitigation work for the PROJECT, agrees that herbicides selected shall be approved by TOWN in order to ensure that exotic/nuisance species are eradicated and desirable native or planted species are not affected, and that the herbicide will be effective on targeted species and comply with all applicable regulations and in accordance with the current manufacturer's label. TOWN may hire outside experts to review herbicides at HOME DYNAMICS expense.
31. HOME DYNAMICS, by and through its Contractor(s) hired to perform the mitigation work for the PROJECT, agrees that transporting, storing, applying, and the herbicides shall be in accordance with Federal, State, and local regulations, and the current manufacturer's label. No full, empty or partially empty containers shall be left on the site after application hours. All empty containers shall be triple rinsed and made unusable. The Contractor(s) shall be required to supply rinse water and containers to store the rinsate. The rinsate and empty herbicide containers shall be disposed of off-site by the Contractor(s) in accordance to all Federal, State, and local regulations. All herbicides purchased, shipped and stored for use under this Agreement shall display the original manufacturer's label at all times. The

Contractor(s) shall take all necessary precautions to prevent any contamination of the surface and ground waters as required by the regulatory agencies. All oil, chemicals, fuel and the like shall be disposed of off-site in an approved manner per Federal, State, and local regulations. Contractor must supply proof of proper disposal.

32. HOME DYNAMICS agrees that its Contractor(s) shall demonstrate satisfactory relevant experience and capability in wetland mitigation as defined in this Agreement. Relevant experience shall consist of five (5) years experience by the person in charge and directly responsible for the work. The installation of plant material shall be supervised by an individual possessing the education and relevant mitigation experience to satisfy TOWN that the quality of plant materials and installation shall equal or exceed PERMIT and LICENSE requirements and TOWN specifications. The Contractor(s) shall submit a minimum of three (3) work references in which the Contractor(s) has performed wetland mitigation construction within the past five (5) years. TOWN shall have the right to exercise approval of Contractor(s); such approval shall not be unreasonably withheld.

The supervisory personnel and all applicators shall be experienced with the identification of the desirable native plant species and the exotic/nuisance plant species within and adjacent to the PROJECT area.

33. No license, permit, or other document issued by BCDPEP, SFWMD or other agencies shall be released upon completion of the work until written authorization is obtained from TOWN. HOME DYNAMICS shall contact TOWN for an inspection upon completion of the work.
34. HOME DYNAMICS shall remit to TOWN a lump sum payment of \$ 943,000.00 within thirty (30) calendar days of approval by the TOWN of the successful completion of the construction phase of the PROJECT and prior to the commencement of HOME DYNAMICS' five (5) year maintenance and monitoring period. Said remittance shall be placed in a special account for the purpose of providing future maintenance, via interest accrued on the principle, after HOME DYNAMICS five (5) year maintenance requirement for the PROJECT has expired and/or payoff of bonds used by the TOWN for the purchase of the mitigation site. The account principle shall remain in the designated account unless otherwise allocated to another account for the same purpose at the discretion of TOWN. Payment is to be made 50% when contract signed and 50% on completion of construction. Copies of the five (5) year quarterly monitoring reports as noted in Exhibit "A" shall be provided to the TOWN concurrent with distribution to the permitting agencies.

35. Third Party Beneficiaries. Except as provided for in this section, no party to this

Agreement intends to directly or substantially benefit a third party by virtue of entering into this Agreement. Therefore, the parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of them based upon this Agreement. The parties expressly acknowledge that it is not their intent to create any rights or obligations in any third person or entity under this Agreement. Notwithstanding the above, HOME DYNAMICS agrees to include the following provision in its agreement with the Contractor(s) performing the mitigation activities on TOWN'S PROPERTY: "Town of Davie shall be a third party beneficiary to this Agreement."

36. Independent Contractor. HOME DYNAMICS is an independent contractor under this Agreement. Services provided by each party pursuant to this Agreement shall be subject to the supervision of the respective party. In providing such services, each party represents that it and its agents shall not act as officers, employees, or agents of the other parties. This Agreement shall not constitute or make the parties a partnership or joint venture.
37. Assignment. Neither this Agreement nor any interest herein shall be assigned, transferred, or encumbered by HOME DYNAMICS except as provided for herein.
38. Conflicts. Neither HOME DYNAMICS nor its employees shall have or hold any continuing or frequently recurring employment or contractual relationship that is substantially antagonistic or incompatible with its loyal and conscientious exercise of judgment related to its performance under this Agreement.

HOME DYNAMICS agrees that none of its officers or employees shall, during the term of this Agreement, serve as an expert witness against any of the parties in any legal or administrative proceeding in which he or she is not a party, unless compelled by court process. Further, HOME DYNAMICS agrees that such persons shall not give sworn testimony or issue a report or writing, as an expression of his or her expert opinion, which is adverse or prejudicial to the interests of TOWN in connection with any such pending or threatened legal or administrative proceeding. The limitations of this section shall not preclude HOME DYNAMICS or any other persons from representing themselves in any action or in any administrative or legal proceeding.



39. Contingency Fee. HOME DYNAMICS warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for that party, to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for a party, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For a breach or violation of this provision, TOWN shall have the right to terminate this Agreement without liability at its discretion and be reimbursed for any expenses incurred by cash payout or staff time spent on PROJECT.
40. Priority of Provisions. If there is a conflict or inconsistency between any term, statement, requirement, or provision of any exhibit attached hereto, any document or events referred to herein, or any document incorporated into this Agreement by reference and a term, statement, requirement, or provision of this Agreement, the term, statement, requirement, or provision contained in Sections 1 through 50 of this Agreement shall prevail and be given effect.
41. Applicable Law and Venue. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any controversies or legal problems arising out of this Agreement and any action involving the enforcement or interpretation of any rights hereunder shall be submitted to the jurisdiction of the State courts of Florida for Town of Davie.
42. Amendments. No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by the Town Council of Davie and HOME DYNAMICS.
43. Severance. In the event this Agreement or a portion of this Agreement is found by a court of competent jurisdiction to be invalid, the remaining provisions shall continue to be effective unless TOWN or HOME DYNAMICS elects to terminate this Agreement. The election to terminate this Agreement based upon this provision shall be made within seven (7) days after the finding by the court becomes final. If HOME DYNAMICS chooses to term agreement, they will reimburse TOWN for all expenses, including staff time.
44. Waiver. The failure of any party to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.
45. Joint Preparation. The parties acknowledge that they have sought and received

whatever competent advice and counsel as was necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this Agreement has been their joint effort. The language agreed to expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the parties than the other.

46. Public Entity Crimes. HOME DYNAMICS acknowledges the existence of Section 287.133(2)(a), F. S., ("Public Entity Crimes Act") which provides, in part, that a person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to TOWN, may not submit a bid on a contract with TOWN for the construction or repair of a public building or public work, may not submit bids on leases of real property to TOWN, may not be awarded or perform work as a Contractor, supplier, subcontractor, or consultant under a contract with TOWN, and may not transact business with TOWN in excess of the threshold amount provided in Section 287.017, Florida Statutes, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list. Violation of this section by HOME DYNAMICS shall result in termination of the Agreement by TOWN without penalty.
47. Incorporation by Reference. The truth and accuracy of the "WHEREAS" clauses set forth above are acknowledged by the parties.
48. Contract Administrators. The Contract Administrators are those individuals designated in Section 13 above. The primary responsibilities of the Contract Administrators are to coordinate and communicate with each other and to manage and supervise execution and completion of the scope of work and the terms and conditions of this Agreement as set forth herein. In the administration of this Agreement, as contrasted with matters of policy, all parties may rely on the instructions or determinations made by the respective Contract Administrators for their particular entity.
49. Multiple Originals. This Agreement may be fully executed in four (4) copies by all parties, each of which, bearing original signatures, shall have the force and effect of an original document.

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**IN WITNESS WHEREOF**, the parties have made and executed this Agreement on the respective dates under each signature: TOWN OF DAVIE through its TOWN COUNCIL, by and through its Mayor or Vice Mayor, authorized to execute same by the Board action on the \_\_\_\_\_ day of \_\_\_\_\_, 2004, and HOME DYNAMICS, INC., signing by and through its President, duly authorized to execute same.

**TOWN**

ATTEST:

TOWN OF DAVIE, through its  
TOWN COUNCIL

\_\_\_\_\_  
Town Administrator and  
Town Clerk  
Town of Davie, Florida

By \_\_\_\_\_  
Mayor

\_\_\_\_\_ day of \_\_\_\_\_, 2004

Insurance requirements  
approved by the Town's  
Risk Manager

By \_\_\_\_\_

Approved as to form by  
Office of Town Attorney  
Town of Davie, Florida  
Monroe Kiar, Town Attorney  
6591 Orange Drive  
Davie, Florida 33314  
Telephone: (954) 584-9770  
Telecopier: (954) 797-1023

By \_\_\_\_\_  
Town Attorney

**HOME DYNAMICS**

WITNESSES:

HOME DYNAMICS, INC.

\_\_\_\_\_

By \_\_\_\_\_  
President

\_\_\_\_\_

\_\_\_\_\_ day of \_\_\_\_\_, 2004

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